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August 24, 2004

Chairman Pat Miller
Tennessee Regulatory Authority
c/o Sharla Dillon, Docket & Records Manager
460 James Robertson Parkway
Nashville, TN 37238

Via Hand Delivery

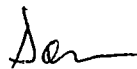
RE: Enforcement of Interconnection Agreement between Bell South
Telecommunications, Inc. & NuVox Communications, Inc.; Docket No.
04-00133

Dear Sharla:

Enclosed for filing on behalf of NuVox Communications, Inc. in the above-referenced matter please find the original and 13 copies of a Motion to Adopt Procedural Order -

Thank you for your assistance. Please do not hesitate to contact me if you have any questions.

Sincerely,



H. LaDon Baltimore

HLD/dcg
Enclosures
cc: Guy Hicks, Esq.
John Heitmann, Esq.

BEFORE THE
TENNESSEE REGULATORY AUTHORITY

In re:)	
)	
Enforcement of Interconnection Agreement)	
Between BellSouth Telecommunications, Inc. and)	Docket No. 04-00133
NuVox Communications, Inc.)	
)	

MOTION TO ADOPT PROCEDURAL ORDER

NuVox Communications, Inc. ("NuVox"), through its counsel and pursuant to Rule 1220-1-2-.06, respectfully requests that the Tennessee Regulatory Authority ("Authority") adopt a procedural order in the above-referenced proceeding. Specifically, NuVox requests that the Authority: (1) adopt and incorporate the record compiled in the nearly identical proceeding that already has been litigated before the Georgia Public Service Commission ("Georgia Commission")¹ into the record in the above-captioned case, (2) adopt the same legal conclusions reached by the Georgia Commission, as described herein; (3) to the extent that the Authority considers adopting legal conclusions that differ from those described herein, establish a schedule for oral argument and briefing; and (4) with respect to the Tennessee-specific factual issue that will need to be decided, namely, whether BellSouth Telecommunications, Inc. ("BellSouth") has demonstrated a concern with respect to the forty-four (44) converted EEL circuits it seeks to audit and the novel legal/factual issue of whether BellSouth would in any instance be entitled to interest, establish a schedule for pre-filed testimony and a limited evidentiary hearing and, in so doing, limit such pre-filed testimony to BellSouth pre-filed direct and NuVox pre-filed rebuttal and require BellSouth to produce all evidence upon which it seeks to rely with its pre-filed direct testimony.

¹ See *Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc and NuVox Communications, Inc* , Georgia Commission Docket No 12778-U, filed in this docket by NuVox July 21, 2004

I. THE AUTHORITY SHOULD INCORPORATE THE RECORD COMPILED IN THE GEORGIA PROCEEDING AND SET A SCHEDULE FOR PRE-FILED TESTIMONY AND AN EVIDENTIARY HEARING THAT ARE LIMITED IN SCOPE TO TENNESSEE-SPECIFIC ISSUES

In lieu of submitting pre-filed direct and rebuttal testimony in this proceeding that would substantially duplicate the efforts made by both parties in the already litigated Georgia complaint docket, NuVox submits that the Authority should incorporate and adopt the record compiled in the proceeding before the Georgia Commission (including the hearing transcript and written submissions of the parties) into this proceeding.² In so doing, the Authority should limit additional pre-filed testimony and exhibits to the Tennessee-specific issues in dispute – namely, whether BellSouth has demonstrated a concern with respect to the forty-four (44) converted EELs circuits that it seeks to audit and whether BellSouth, in any instance, would be entitled to interest.³

NuVox and BellSouth have entered into a multi-state Interconnection Agreement that governs their relationship throughout the BellSouth region. Although each state has approved the Agreement separately, the relevant provisions of the Agreement do not vary in any state.⁴ Additionally, the Agreement is to be interpreted in accordance with Georgia law by the

² Upon request, NuVox will furnish the Authority with copies of its filings, the transcript, the hearing officer recommendation, and the Georgia Commission decision in that case

³ NuVox has on several occasions, including as recently as this week, asked BellSouth for documentation supporting its allegations of concern. To date, BellSouth has been unable or unwilling to provide any. For more than two years now, NuVox has informed BellSouth that it may proceed with an audit of any converted circuit for which it demonstrates a concern once it hires and pays for an independent auditor that will perform an audit in compliance with AICPA standards. While NuVox has made plain its willingness to abide by the Agreement, BellSouth intransigently has insisted on far more than it is entitled to under the Agreement.

⁴ See NuVox Answer at 3 (noting that the parties submitted the Agreement to each state commission separately, and each state commission has approved the Agreement).

Authority⁵ and its counterparts in the other eight states where BellSouth operates as the dominant incumbent.⁶

BellSouth has raised two primary legal issues in its complaint, each of which the Georgia Commission already has resolved under the same language in the identical Agreement: (1) whether BellSouth is required to demonstrate a concern prior to conducting an audit, and (2) whether BellSouth must appoint an independent auditor to conduct the audit in compliance with AICPA standards. On each issue, the Georgia Commission found in the affirmative and in so doing ruled in NuVox's favor.⁷ BellSouth did not challenge either of these decisions in its recently filed petition for reconsideration of the Georgia Order.⁸

Several ancillary legal issues raised by BellSouth here also were addressed by the Georgia Commission. These issues, included (1) the scope of the audit, (2) which party must pay for an

⁵ Contrary to what BellSouth has contended elsewhere and likely will contend here, NuVox does not challenge the Authority's jurisdiction to hear and decide this case. NuVox merely is trying to foil BellSouth's attempt to litigate it into submission by asking the Authority to handle this case in a manner that is judicially prudent, economical and fair. Over the course of a two-plus year proceeding before the Georgia Commission, BellSouth reinvented its case time and again, while NuVox held steady to the same position. NuVox simply asks the Authority to make prudent use of what has been done already in Georgia, as the underlying legal issues and interconnection agreement are the same. For the record, only BellSouth has asserted (before the Georgia Commission) that the role of the Authority should be usurped by another commission. "Georgia law governs this agreement. BellSouth's view is what Commission better to decide what Georgia law requires than the Georgia Public Service Commission." See Georgia Tr. at 48 (Aug. 13, 2002).

⁶ See Agreement, General Terms and Conditions, § 23 (stating that the Agreement is "governed by, and construed in accordance with, the laws of the state of Georgia.")

⁷ See Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc., Georgia Commission Docket No. 12778-U, Order Adopting in Part and Modifying in Part the Hearing Officer's Recommended Order, at 5-8, 12-14 (June 29, 2004) ("Georgia Order"). Notably, the Georgia Commission record makes clear that the auditor proposed by BellSouth, American Consultants Alliance (ACA), cannot certify AICPA compliance and cannot be deemed to be free from the influence of BellSouth (e.g., private mid-audit conversations seeking "help" from BellSouth).

⁸ See BellSouth Telecommunications, Inc.'s Motion for Rehearing, Reconsideration, and Clarification Docket No. 12778-U (July 7, 2004). On August 17, 2004, the Georgia Commission voted to deny BellSouth's requests to reconsider its decision regarding the limited scope of the audit and BellSouth's obligation to pay for the audit, regardless of the result. The Georgia Commission voted to grant BellSouth's request to clarify that it did not address disclosure of proprietary information under Section 222(d) of the Federal Telecommunications Act. A copy of the Georgia Commission's Staff Recommendation, which was adopted by Georgia Commission vote on August 12, 2004, is attached hereto as Attachment A. A copy of the Georgia Commission's written decision disposing of BellSouth's motion will be supplied after it is released.

AICPA-compliant audit, and (3) the extent to which BellSouth could disclose customer proprietary network information or carrier proprietary information to an independent auditor. In finding that: (1) that the scope of the audit should be limited to those circuits for which BellSouth had demonstrated a concern,⁹ (2) BellSouth must pay for an AICPA-compliant audit, regardless of the result¹⁰ and (3) that BellSouth may not release CPNI information with permission from the carrier to which the information pertains,¹¹ the Georgia Commission again ruled in NuVox's favor.¹²

Because BellSouth has asked the Authority to decide the same issues as those that were before the Georgia Commission (with the exception of whether BellSouth must pay for the audit – which it repeatedly has said that it would, regardless of the outcome), interpreting the same Agreement under governing principles of Georgia contract law (which also applies in Tennessee),¹³ incorporating the pleadings prepared in the Georgia proceeding, the evidentiary record compiled and the Georgia Commission's Order into this proceeding would facilitate the Authority's expeditious and economical resolution of the issues raised in this proceeding. NuVox respectfully requests that the Authority order such incorporation of the Georgia Order, record and pleadings. NuVox also respectfully requests that the Authority adopt the same legal conclusions referenced above as reached by the Georgia Commission. As noted above, BellSouth has not requested reconsideration of the Georgia Commission's conclusion with respect to the primary legal issues raised in this case (concern and independent auditor).

In addition, the Georgia Commission's conclusions with respect to the ancillary issues raised are sound and BellSouth has not demonstrated otherwise. Accordingly, NuVox requests

⁹ Georgia Order, at 11

¹⁰ *Id.* Order, at 14.

¹¹ *Id.*, at 11-12

¹² With this track record established, NuVox thinks it was well founded in describing the Georgia Commission's decision as vindicating NuVox's stance in this two-and-a-half year battle with BellSouth. Yes, BellSouth gets an audit – but only the audit that NuVox said it could have all along

¹³ See Agreement, General Terms and Conditions, § 23 (stating that the Agreement is "governed by, and construed and enforced in accordance with, the laws of the state of Georgia ")

that the Authority adopt the Georgia Commission's decisions that: (1) limited the scope of the audit to those converted EEL circuits for which a concern has been demonstrated,¹⁴ (2) affirmed BellSouth's commitment to pay for an AICPA compliant audit¹⁵ and (3) found that BellSouth may not disclose CPNI or CPI without the permission of the carrier to which such information pertains.¹⁶ To the extent that the Authority considers adopting conclusions other than these, NuVox respectfully requests opportunity for oral argument and briefing.

With respect to the Tennessee-specific issue that will need to be decided, namely, whether BellSouth has demonstrated a concern with respect to the forty-four (44) converted EEL circuits it seeks to audit, NuVox requests that the Authority, subsequent to its adoption of legal conclusions, as requested above, establish a schedule for pre-filed testimony and a limited evidentiary hearing.¹⁷ Such pre-filed testimony and hearing also should encompass the issue (new to this complaint) that BellSouth should be entitled to interest in some manner.¹⁸ In this regard, so as to avoid the ambush tactics employed repeatedly by BellSouth in the Georgia case, NuVox requests that the Authority limit such pre-filed testimony to BellSouth pre-filed direct and NuVox pre-filed rebuttal and require BellSouth to produce all evidence upon which it seeks to rely with its pre-filed direct testimony.

II. CONCLUSION

For the foregoing reasons, NuVox respectfully requests that the Authority:

¹⁴ Georgia Order, at 11, affirmed by Georgia Commission vote on August 12, 2004, *see also* Georgia Commission Staff Recommendation at 3

¹⁵ *Id.*, at 14, affirmed by Georgia Commission vote on August 12, 2004, *see also* Georgia Commission Staff Recommendation at 4

¹⁶ *Id.*, at 11-12, the Georgia Commission vote on August 12, 2004 clarified that its decision addressed disclosure of information under Section 222(c). The Georgia Commission has not addressed the distinction between carrier proprietary information and customer proprietary information, nor has it addressed disclosure under Section 222(d) or the basic issue of what information, if any, may be provided to the auditor by BellSouth. Nuvox's position is that the Agreement provides for an audit of Nuvox's records only. To the extent that BellSouth seeks to turn an audit into anything other than that, there will be additional issues that the Authority will need to resolve.

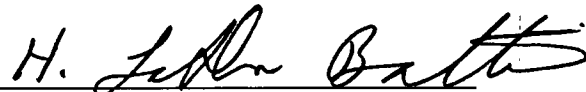
¹⁷ NuVox estimates that an evidentiary hearing, of limited scope as described herein, would last a few hours and involve the testimony of one or two witnesses on behalf of NuVox.

¹⁸ BellSouth asserts no basis for this claim as there is no basis for it.

- (1) incorporate into the record of this proceeding the Georgia Order, record and pleadings;
- (2) adopt the same legal conclusions reached by the Georgia Commission, as described above;
- (3) to the extent that the Authority considers adopting legal conclusions that differ from those described herein, establish a schedule for oral argument and briefing;
- (4) with respect to the Tennessee-specific issue that will need to be decided, namely, whether BellSouth has demonstrated a concern with respect to the forty-four (44) converted EEL circuits it seeks to audit and the legal/factual issue of whether BellSouth would in any instance be entitled to interest, establish a schedule for pre-filed testimony and a limited evidentiary hearing and limiting such pre-filed testimony to BellSouth pre-filed direct and NuVox pre-filed rebuttal and requiring BellSouth to produce all evidence upon which it seeks to rely with its pre-filed direct testimony.

Respectfully submitted,

NuVox Communications, Inc.



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Counsel to NuVox Communications, Inc

Certificate of Service

The undersigned hereby certifies that on this the 24th day of August, 2004, a true and correct copy of the foregoing has been forwarded via first class U. S. Mail, hand delivery, overnight delivery, or facsimile transmission to the following.

Guy Hicks
Bellsouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201


H. LaDon Baltimore

BEFORE THE
TENNESSEE REGULATORY AUTHORITY

In re:)	
)	
Enforcement of Interconnection Agreement)	
Between BellSouth Telecommunications, Inc. and)	Docket No. 04-00133
NuVox Communications, Inc.)	
)	

ATTACHMENT A

to Motion of NuVox Communications, Inc. to Adopt Procedural Order

Georgia Public Service Commission Staff Recommendation
for BellSouth's Motion for Rehearing, Reconsideration and Clarification
Georgia Public Service Commission Docket No. 12778-U

Item R-3

Docket No. 12778-U, *Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*

Summary

BellSouth raised three grounds on reconsideration. The Staff recommends that the Georgia Public Service Commission ("Commission") deny BellSouth Telecommunications Inc.'s ("BellSouth") Motion for Rehearing, Reconsideration and Clarification ("Motion") with regard to the scope of the audit and which party must pay for the audit. On the final ground, use of the customer proprietary network information ("CPNI"), the Staff recommends that the Commission clarify that its June 30, 2004 Order did not address 47 U.S.C. 222(d); however, the Staff recommends that the Commission state that this clarification does not mean either that the Commission agrees that BellSouth may release the information under subsection 222(d) or that the Commission agrees with BellSouth's argument that the Commission does not have the authority to enforce this code section.

Background

On June 30, 2004, the Commission issued an Order Adopting in Part and Modifying in Part the Hearing Officer's Recommended Order in the above-styled matter. The Commission concluded BellSouth was entitled under the parties' interconnection agreement and the applicable law to conduct an audit NuVox Communications, Inc.'s ("NuVox") records in order to confirm that NuVox is complying with its certification that it is the exclusive provider of local exchange service to its end users. (Order, p. 15).

BellSouth's Pleadings

On July 7, 2004, BellSouth filed with the Commission a Motion for Rehearing, Reconsideration and Clarification ("Motion"). In its Motion, BellSouth challenges the Commission's order with respect to conditions and limitations on the audit. On August 3, 2004, BellSouth filed a Reply in Support of its Motion. ("BellSouth Reply")

1. Scope of the Audit

First, BellSouth moved for reconsideration of the scope of the audit. BellSouth argues that the Order is inconsistent with the Commission's vote at its Administrative Session.

At the Administrative Session, Commissioner Burgess made the following motion, which the Commission adopted, to amend the Staff's recommendation on the scope of the audit:

. . . at this time the audit be limited to forty-four circuits which BellSouth has provided the billing information. And depending upon the outcome of that audit, then the Commission would authorize BellSouth to go forward with a full audit of

the remaining 340 some circuits. That would be the amendment that I would offer at this time.

BellSouth argues that the “obvious import” of the amendment that a finding that NuVox falsely certified with respect to any customer served by the forty-four EELs audited BellSouth would be permitted to conduct a “full audit” of the remaining EELs. (Motion, p. 2). BellSouth argues that the Order is inconsistent with this vote because it does not allow BellSouth to proceed with a full audit until the Commission determines whether it is appropriate to expand the scope of the audit. *Id.*

BellSouth argues that if it is required to demonstrate a concern on a “circuit-by-circuit” basis, then the results of the audit will not be able to be used to demonstrate that concern. (BellSouth Reply, p. 3). BellSouth also argues that there is no authority for requiring BellSouth to demonstrate a concern on a “circuit-by-circuit” basis. *Id.*

2. Responsibility to Pay for the Audit

Second, BellSouth moved for reconsideration of the Commission’s finding that BellSouth was responsible for paying for the audit. BellSouth argues that because the Commission found that the parties did not evidence the intent to part from federal law on the independence of the auditor, the Commission is obligated to apply the requirements of the *Supplemental Order Clarification* as to who pays for the audit. (Motion, p. 4). The *Supplemental Order Clarification* requires competitive local exchange carriers to reimburse the incumbent if the audit uncovers non-compliance. *Id.* Finally, BellSouth argues that the language that BellSouth conduct the audit “at its sole expense” applies only to if BellSouth itself conducts the audit. *Id.*

3. CPNI

Finally, BellSouth requests that the Commission clarify its Order was not intended to preclude the disclosure of CPNI to the auditor pursuant to provisions of the Federal Act other than 47 U.S.C. 222(c)(1), which was specifically addressed. BellSouth argues that the Commission does not have the authority to enforce 47 U.S.C. § 222(d).

NuVox’s Responses

On July 15, 2004, NuVox filed with the Commission its Opposition to BellSouth’s Motion (“Opposition”). On August 5, 2004, NuVox filed its Reply in Support of its Opposition to BellSouth’s Motion (“NuVox Reply”).

1. Scope of the Audit

Nuvox argues that the Order accurately characterizes the Commission’s vote at Administrative Session. NuVox states that the Commission determined that it would hold off on determining whether to expand the scope of the audit until it had the opportunity to review the findings of the limited audit. (Opposition, p. 2). NuVox states that if BellSouth finds non-compliance, “then it

may attempt to raise additional concerns and it may approach the Commission to request that it be permitted on that basis to broaden the scope of the audit.” *Id.* at 3.

2. Responsibility to Pay for the Audit

NuVox argues that the plain language of the audit obligates BellSouth to bear the costs of the audit regardless of the outcome, and that nothing in the agreement conditions that obligation on whether BellSouth itself, as opposed to an independent auditor. (Opposition, p. 4).

3. CPNI

NuVox argues that the clarification that BellSouth seeks would allow it to sidestep the intent of the Order and federal law. (Opposition, p. 6). NuVox also argues that BellSouth has not supported that 47 U.S.C. 222(d) justifies release of CPNI to the auditor. *Id.*

NuVox also argues that the information is CPI, governed by subsection 222(d), and not CPNI. NuVox argues that 222(b) does not allow the release of this CPI under the current circumstances. (NuVox Reply, p. 6). NuVox argues that even if the information is considered CPNI, subsection 222(d) does not permit the release of this information. *Id.* at 8. NuVox also argues that BellSouth has waived its rights to assert 222(d) because it did not pursue the argument earlier. *Id.* at 9.

Staff Recommendation

1. Scope of the Audit

The Order is consistent with the Commission’s vote. The Order states that “[o]nce the results of this limited audit are examined, the Commission may determine that it is appropriate to expand the scope of the audit to the other converted circuits.” (Order, p. 11). The Commission voted to expand the scope of the audit depending on the outcome of the audit of the forty-four circuits. Practically, this can only mean that the Commission may determine to expand the scope of the audit.

The Commission did not commit to allowing a full audit upon the finding of a false certification with respect to a single customer. The Commission did not vote to set a particular standard on what specific audit findings would warrant expanding the scope. A reasonable interpretation of the Commission vote is that the Commission intended to evaluate the audit findings before it tied its hands on the decision of whether to expand the scope of the audit. This approach makes sense and is not legal error.

The Commission could find, consistent with its Order, that an audit that revealed a sufficient number of violations with respect to the forty-four circuits was adequate to demonstrate a concern for other converted circuits not included in the limited audit.

2. Responsibility to Pay for the Audit

The Commission found that the agreement did not state that the auditor did not have to comply with the requirements under federal law. Consistent with relevant case law, parties may stipulate for other legal principles to govern their contractual relationship, but the intent to do so will not be implied. *Jenkins v. Morgan*, 100 Ga. App. 561, 562 (1959). The agreement did not indicate that the parties intended to vary from the federal law requirement that the audit be conducted by an independent auditor. Therefore, the Commission, by not impermissibly implying such intent, determined that under the contract BellSouth must use an independent auditor to conduct the audit.

BellSouth did commit expressly to pay for the audit. The intent for the audit to take place at BellSouth's sole expense is not implied. Consistent with contract law that allows parties to stipulate to terms independent from the law, BellSouth must pay for the audit.

3. CPNI

The Staff recommends that the Commission clarify that its order did not speak to 47 U.S.C. § 222(d)(2), but to specify that this clarification does not mean either that the Commission agrees that BellSouth is permitted to disclose the CPNI to an auditor under this subsection or that the Commission agrees with BellSouth's arguments that the Commission cannot enforce this subsection.

The issue before the Commission was whether to require BellSouth under 47 U.S.C. § 222(c)(1) to provide the information to the auditor. While it is true that BellSouth mentioned subsection (d) in a footnote to its Application for Review of the Hearing Officer's Recommended Order, the footnote merely stated that "arguably" BellSouth could release the CPNI under subsection (d)(2), but urged the Commission to avoid arguments over the scope of this subsection and merely order BellSouth under subsection (c)(1) to provide the information.

The Commission declined to order BellSouth under subsection (c)(1) to release the information to its auditor. BellSouth is not asking the Commission for permission under subsection (d)(2), and should it disclose the information to the auditor, it will do so at its own risk.

The Staff also notes that it does not have an adequate record to examine the issue of whether the information in question is "CPNI" or "CPI" as NuVox contends.